Supreme Court, U.S.
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No. 99-1633

In The

Supreme Court of the United States

U.S. BORAX INC.,

Petitioner,

v.

NANCY FORSTER, as Personal Representative of the Estate of CHARLES F. READE, SR.,

Respondent.

On Petition For A Writ Of Certiorari To The Fourth District Court Of Appeal Of The State Of Florida

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

U.S. Borax Inc. ("Petitioner") respectfully submits this reply brief in support of its petition for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of the State of Florida in this case.

In its Brief, Respondent concurs in Petitioner's request that this Court grant a writ of certiorari to review and resolve the second question presented. It appropriately acknowledges, in Petitioner's view, that the dispute between the parties in that regard "involves a legal issue of general public importance on which a conflict of authority creates widespread uncertainty." Respondent's Br. at 5.

With respect to the first question presented by Petitioner, Respondent opposes a grant of the writ on the grounds that "the Florida probate court specifically found as a fact that Petitioner 'was not a reasonably ascertainable creditor nor known to the Personal Representative.' " Respondent's Br. at 4. Respondent's argument should be rejected for three reasons.

First, it is not clear that the Florida probate court's statement in this regard was intended to be a finding of fact or a conclusion of law. The order, *see* Petitioner's App. at 14-15, is bereft of any recitation of the bases for its determination or of any evidence that it understood the extent to which "knowledge" and "ascertainability" are terms of art shaped by this Court's decisions in a long line of procedural due process decisions running from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), to *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S.

478 (1988). Under such circumstances, this Court has held that it "will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927).

Second, the decision of the Fourth District Court of Appeal affirming the probate court does not provide any explicit indication that its affirmance encompassed the lower court's summary statement as to knowledge and ascertainability. *See* Petitioner's App. at 12-13. Rather, as the petition argues, the appellate court's affirmance can be read more reasonably to represent a reaffirmation of the incorrect contingent/conjectural equation established by its earlier decision in *U.S. Trust Co. of Fla. Sav. Bank v. Haig*, 694 So. 2d 769 (Fla. 4th DCA 1997) (Petitioner's App. at 12-14).[1]

Finally, to the extent that the probate court's statement about "knowledge" and "ascertainability" justifies being viewed as a finding of fact, Petitioner should not be denied an opportunity to have this Court determine whether the criteria utilized by the probate court with respect to the question of actual notice comported with constitutional requirements merely because of a failure to articulate the basis for its action. The need for such

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[1] Since the petition for certiorari was filed in this case, the Fourth District Court of Appeal has addressed again the question of adequacy of notice in the context of estate administration. *See In re Estate of Ortolano*, Case. No. 4D99-1872, 2000 WL 390335 (Fla. 4th DCA Apr. 19, 2000).

review is especially important, given the unique interaction between the effective prosecution of CERCLA litigation and the administration of estates, as described in detail in the petition.

CONCLUSION

For the reasons set forth above and in Petitioner's opening brief, the petition for a writ of certiorari should be granted as to both questions presented.

Respectfully submitted,

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